Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144

COMMENTS OF NCTA – THE INTERNET AND TELEVISION ASSOCIATION

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COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA)[1] hereby submits comments in the above-captioned proceeding.[2] With the launch of this proceeding, the Commission seeks to "eliminate or modify regulations that are outdated, unnecessary or unduly burdensome" to reduce or clear "undue regulatory burdens that can stand in the way of competition and innovation in media markets."[3]

[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving 85 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing more than $250 billion over the last two decades to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 30 million customers.

[2] *See* FCC, Public Notice, *Modernization of Media Regulation Initiative,* 32 FCC Rcd 4406 (2017) ("*Public Notice*").

[3] *Id.* at 1.

INTRODUCTION AND SUMMARY

Back when many of the regulations addressed in these comments were being considered, this is how our filings at the Commission looked. Desktop word processing was a new and primitive invention. “Media regulation” was targeted at broadcasting and cable television, since direct broadcast television (“DBS”) was just getting off the ground, telephone companies were prohibited from offering video programming services, DVDs were still being invented, mobile video was limited to small TVs capable of receiving over-the-air signals, and the Internet was in its infancy, barely capable of rudimentary communication, let alone the streaming video and other advanced services we have today. In addition, over 50 percent of the roughly 100 national programming networks available to consumers were owned by a cable operator.

A lot has changed in the last 25 years.

This comprehensive review is a welcome and long-overdue step. The cable industry remains subject to numerous outdated regulations that impose unnecessary costs and unique burdens.

To be sure, the Commission cannot address all the relevant issues on its own. Much of cable’s regulatory treatment is not a product of FCC rules alone but rather stems from the decades-old 1992 Cable Act. While only Congress can remove certain outdated provisions, the Commission can and should use this proceeding to identify outdated regulations and take other steps, including follow-on rulemakings, to adjust its rules and policies, including those implementing the Act's provisions, to more accurately reflect today's intensely competitive environment.

Today, cable operators are locked in fierce competition with DBS, phone companies, and others, and in recent years, there has been dramatic growth in online providers. This competition is more powerful and effective than regulation in effectuating those policies. The deadweight costs imposed by unnecessary regulations would dampen innovation and harm consumers even if they were imposed equally on all competitors. But most of the burdens of Title VI fall uniquely on cable operators and not on their competitors, artificially distorting competition in the marketplace. Moreover, the Commission has, in some cases, adopted expansive interpretations of its authority under the Act – interpretations that impose even greater regulatory burdens today than were intended a quarter century ago.

In addition, some of the regulations imposed decades ago are grounded in outmoded views of consumer behavior. Adopted before the Internet was available in anyone's home, these rules impose obligations that make little sense in a world where information is simply a click away and in which more people communicate via e-mail than communicate by mail (or read the newspaper).

Rules that continue to require operators to provide information of little interest to consumers should be eliminated, and remaining notices and customer correspondence should be permitted to be provided electronically so long as those who desire to receive a paper copy continue to be able to do so.

Finally, the Commission should eliminate certain routine information collections that impose costs but produce little of value. For example, Form 325 should no longer be required, and the cable public file obligations should be scrubbed to ensure that operators are not required to report and post information that is of little (if any) interest to the public.

I. THE COMMISSION SHOULD MINIMIZE THE NUMBER OF REQUIRED NOTICES AND PERMIT CABLE OPERATORS TO USE ELECTRONIC MEANS TO CORRESPOND WITH CUSTOMERS AND PROVIDE NOTICES.

Over the years, the number of required notices to cable customers – most of which can be found in Subpart T of Part 76 – has proliferated. This proceeding provides an excellent opportunity to prune numerous unnecessary notices. Moreover, even in cases where proactively notifying customers retains its purpose, the Commission should evaluate whether there are more efficient, more effective, and less costly ways to do so using mainstream technologies that consumers use more frequently than postal mail. In addition, to the extent cable operators are required to correspond with their customers, they should expressly be permitted to do so via electronic means where the customer has provided the provider with, or contacted the provider using, electronic means.

Initial and annual notice. Just last month, the Commission granted NCTA and ACA's 2016 Petition for Declaratory Ruling that will enable operators to provide e-mail notifications of certain information to customers for whom the operators have a verified e-mail address.[4] This welcome ruling will reduce costs and unnecessary paperwork while adding convenience for customers. As the Declaratory Ruling notes, "the benefits of permitting e-mail delivery include the positive environmental aspects of saving substantial amounts of paper annually, increased efficiency and enabling customers to more readily access accurate information regarding their service options. In addition, we note that this clarification is consistent with other Commission actions permitting electronic records in lieu of paper records."[5]

Permitting electronic delivery of certain required notices is a significant first step in reducing the burdens of compliance with this rule and modernizing the Commission's regulations to better reflect consumers' communication preferences. The Commission should now take the next step and look with a fresh eye at whether there is any legitimate reason to require cable operators, and cable operators alone, to send this routine information to customers – or whether including it on a company website for viewing at any time as needed should be sufficient.

Such a review would reveal that Section 76.1602(b) requires operators to provide detailed information at installation and annually that appears to be of little utility to customers and can

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[4] *In re National Cable & Telecommunications Association and American Cable Association Petition for Declaratory Ruling*, Declaratory Ruling, FCC 17-73, MB Dkt. No. 16-126 (rel. June 21, 2017) ("*Electronic Notices Ruling*").

[5] *Id.* ¶ 6.

become frequently outdated. For example, service offerings and channel positions often change more frequently than annually. This requirement to provide this snapshot in time may have made sense when it was adopted decades before the advent of company websites, but should be reexamined now that operators can provide much more timely information using other, less burdensome means that are usually more likely to inform subscribers.[6]

Advance notice of rate and service changes. Section 76.1603 contains another notice provision that warrants review. It requires, among other things, that cable operators give advanced written notice to local franchising authorities ("LFAs") and customers of "any rate or service change,"[7] which not only must state the amount of the change, but also must "briefly explain in readily understandable fashion the cause of the rate change (*e.g.*, inflation, change in external costs or the addition/deletion of channels)."[8] This prescriptive aspect of the notice requirement is a vestige of a time when the Commission and LFAs regulated cable system rates and should be eliminated.[9]

In other respects, the rule imposes unnecessary burdens on operators to provide change notices. For example, Section 76.1603(b) requires operators to "notify subscribers 30 days in

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[6] Cable operators have no intention of discontinuing their practice of honoring customers' individual communication preferences, and they would accordingly continue to notify, via postal mail, subscribers who have specified that format as their preferred form of communication.

[7] 47 C.F.R. § 76.1603(c).

[8] *Id*.

[9] The Commission itself has recognized the sea change that has occurred in the video marketplace. In the 2015 order in which the Commission concluded that cable systems nationwide are presumptively subject to effective competition – the effect of which has been to largely eliminate cable rate regulation around the country – the Commission underscored that the video marketplace is "markedly different" than it was two decades ago, "with cable operators facing dramatically increased competition." *Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of the STELA Reauthorization Act*, Notice of Proposed Rulemaking, 30 FCC Rcd. 2561 ¶¶ 6-7 (2015); *see also Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574 ¶¶ 4, 7 (2015). And in defending that decision before the D.C. Circuit earlier this year, the Commission reiterated that "the MVPD market has undergone a fundamental transformation." Brief of Respondents at 11, *Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, No. 15-1295, (D.C. Cir. Feb. 2, 2016).

advance of any significant changes in the other information required by 76.1602." As noted above, much of this information is of little value to customers and readily available on company websites. There is no continuing need to regulate with the degree of specificity contained in this rule.

Even if the Commission were to retain some or all of Section 76.1603's notice requirements, at a minimum it should use this opportunity to clarify that a "written" notice for these purposes includes an electronic notice. Congress gave cable operators significant leeway in Section 632 of the Cable Act, which provides that "[a] cable operator may provide notice of service and rate changes to subscribers *using any reasonable written means at its sole discretion*."[10] The Commission made clear twenty years ago that these types of Section 76.1603 written notices need not appear in subscribers' bills and that "notice provided through written announcements on the cable system or in the newspaper will be presumed sufficient."[11] Today, many forms of electronic notice, including notice by e-mail, would be much more likely to inform subscribers than notice published in a print newspaper. Moreover, in crafting notice requirements more recently, the Commission has equated notice by e-mail with notification methods that are considerably more likely to apprise customers of information than "snail mail."[12]

Accordingly, the Commission should update its policies to reflect changes in the way that customers and operators communicate, and, consistent with its treatment of electronic notices under Section 76.1602(b), it should clarify that any notice required under Section 76.1603 also

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[10] 47 U.S.C. § 552(c) (emphasis added).

[11] *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937 ¶ 39 (1996).

[12] *See, e.g.*, 47 C.F.R. 8.13(c)(1) (permitting answers to open Internet-related formal complaints to be served on parties by either hand delivery, overnight mail, or e-mail).

may be provided by e-mail or other electronic means.[13] Such a clarification would be consistent with the statutory directive that cable operators have "sole discretion" to use "any reasonable written means" to notify customers, as well as the Commission's confirmation in its recent *Electronic Notices Ruling* that e-mail is a form of "written" notice.[14]

Charges for customer service changes. Another required notice ripe for reexamination mandates that the "cable system must notify all subscribers in writing" of certain charges for changes in service tiers.[15] This notice rule is a vestige of the rate rules implementing the 1992 Act when both the basic and expanded basic tiers were rate regulated.[16] It no longer can be justified where the Commission no longer can regulate the rates for the cable programming service tier and should be eliminated.

Basic tier availability. The 1992 Cable Act required the Commission to adopt regulations that included "notice of the availability of the basic service tier."[17] The Commission should clarify that the "written notification" required under its rules[18] – an artifact of a bygone era when cable was the only major multichannel video distribution platform – need not be provided in paper format and can instead be provided on the cable operator's website, to which

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13 *See Electronic Notices Ruling*, Statement of Commissioner Michael O'Rielly (noting that allowing Section 76.1602(b) notices to be delivered by e-mail "comports nicely with our overall push to recognize the current realities of business communications and realize efficiencies by permitting, or in some cases requiring, paper transmissions to go electronic," and stating his "hope that the Commission will be able to keep things moving in this direction.").

14 *Electronic Notices Ruling* ¶ 6 ("E-mails, by their very nature, convey information in writing.").

15 47 C.F.R. § 76.1604.

16 *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation,* Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 ¶¶ 76-78 (1993).

17 47 U.S.C. § 543(b)(5)(D).

18 47 C.F.R. § 76.1618.

most customers would instinctively turn for information about programming packages and channel lineups.[19]

Equipment compatibility and DTV transition. Various notices related to required equipment and consumer education are relics of long-outdated technologies and policies and should be eliminated. Section 76.1621 requires operators to provide special equipment to be used with VCRs and a television set, or to support picture-in-picture.[20] Section 76.1622 requires operators to conduct a written consumer education program on equipment compatibility for equipment that no longer is routinely used by consumers.[21] The Commission should eliminate these outdated requirements. Section 76.1630 (MVPD digital television transition notice) has likewise expired and also should be eliminated.[22]

Privacy notice. Section 631 requires a cable operator at the time of initial sign-up and at least annually to provide a privacy notice "in the form of a separate, written statement" that "clearly and conspicuously informs the subscriber" of the nature of certain specified practices.[23] While these privacy notices, unlike some of the other notices highlighted above, retain their importance and relevance, the method of their delivery should be updated. The Commission should extend the benefits delivery by e-mail or other electronic means to both initial and annual privacy notices.[24]

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[19] The Commission should also revisit a similar requirement in Section 1603(d) that operators notify subscribers of changes in rates for the basic service tier or associated equipment. *See* 47 C.F.R. § 76.1603(d). At a minimum, the Commission should permit cable operators to satisfy the requirement by providing the relevant information on their websites.

[20] *See* 47 C.F.R. § 76.1621.

[21] *See id.* § 76.1622.

[22] *See id.* § 76.1630.

[23] 47 U.S.C. § 551(a)(1).

[24] *See supra* note 13.

Notices to broadcasters. The Commission's rules also require that cable operators provide notices to broadcasters in certain situations.[25] Giving cable operators the option of delivering such notices via e-mail or other electronic means, including where the rule requires that notice be "written" or "in writing," would ease burdens on both cable operators and broadcasters without adversely impacting anyone.

Responses to complaints submitted electronically. The Commission's Consumer Help Center website allows consumers to submit complaints involving service providers electronically, and the website states that service providers must respond to the Commission and provide a copy of that response to the consumer who submitted the complaint.[26] The Commission should clarify that providers may use e-mail to respond to such complaints when the customer has provided an e-mail address on the complaint form and has not specifically requested a different format.[27] The Commission already permits common carriers and Internet service providers to respond by e-mail to *formal* complaints,[28] which are subject to detailed filing requirements including hand-delivery to the named defendant.[29] It would make little sense to

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[25] *See* 47 C.F.R. § 76.1601 (written notice of channel deletion or repositioning); *id*. § 76.1607 (written notice by certified mail of change in principal headend); *id.* § 76.1608 (notice of integration of cable systems); *id.* § 76.1609 (notice of network non-duplication or syndicated exclusivity protection); *id.* § 76.1614 (written response to request for identification of must-carry signals carried); *id.* § 76.1617 (initial must-carry notices).

[26] Consumer Complaint Center, https://consumercomplaints fcc.gov/hc/en-us/articles/202752940-Your-Role-in-the-FCC-Consumer-Complaint-Process (last visited June 29, 2017).

[27] NCTA does not object to rules which appropriately allow consumers submitting complaints regarding accessibility to specify the format of the response. *See, e.g.*, *id*. § 14.36(b)(1)(vi) (informal complaint regarding accessibility of advanced communications services); *id*. § 68.419 (informal complaint regarding hearing aid compatibility).

[28] 47 C.F.R. § 1.735(f) (permitting answers to formal complaints against common carriers to be delivered by e-mail); *id*. 8.13(c)(1) (permitting the same for formal complaints regarding open Internet rules).

[29] *Id*. § 1.735(c) (requiring that formal complaints against common carriers be hand-delivered to the named defendant or its registered agent); *id*. § 8.13(b)(2) (requiring the same for formal complaints regarding open Internet rule violations).

require providers to respond in hard copy to complaints submitted more informally via the Internet. An electronic submission implicitly and reasonably calls for an electronic response.[30]

II. THE COMMISSION SHOULD RESTORE THE PROPER SCOPE OF THE PROGRAM ACCESS PROVISION.

Section 628 of the Communications Act, enacted as part of the 1992 Cable Act, is generally known as the "program access" provision of Title VI. Section 628(b) generally prohibits a cable operator or a satellite cable programming vendor in which a cable operator has an attributable interest from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] *from providing satellite cable programming* . . . to subscribers or consumers."[31] Section 628(c) meanwhile directed the Commission to promulgate regulations setting forth particular conduct that would be prohibited by the general prohibition in Section 628(b).[32] And it set forth certain types of conduct that had to be included in those regulations – *e.g.*, certain exclusive and discriminatory contracts – all of which had to do with access by competing MVPDs to satellite cable programming in which a cable operator had an attributable interest.[33]

Until 2007, it was commonly understood that (as the legislative history made clear) Section 628 was exclusively and specifically concerned with issues of DBS and other competitive MVPDs' access to cable-affiliated, satellite-delivered programming.[34] But in that year, the Commission issued a rulemaking decision that broadly expanded the scope of Section

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[30] This approach would also be consistent with prior guidance from the Consumer and Governmental Affairs Bureau allowing providers to submit responses to informal complaints against common carriers via e-mail. *See Consumer & Governmental Affairs Bureau Reminds Common Carriers of Their Obligation to Timely Respond to Informal Complaints*, Public Notice, 22 FCC Rcd. 4243 (2007).

[31] 47 U.S.C. § 548(b) (emphasis added).

[32] *Id.* § 548(c).

[33] *See id.*

[34] *See, e.g.*, 138 Cong. Rec. H6487, 6533 (1992) (statement of Rep. Tauzin).

628(b) to issues well beyond program access; in fact, its interpretation was sufficiently broad to prohibit *any* conduct by a cable operator that had the effect of harming the ability of another MVPD to compete even if the conduct was pro-competitive.[35] Specifically, the Commission held that Section 628(b) authorized a rule prohibiting cable operators from entering into exclusive contracts with multiple dwelling unit ("MDU") building owners.[36] In its view, contracts that hinder the ability of competing MVPDs to provide *any* programming to consumers in MDU buildings hinder those MVPDs from providing *satellite* cable programming.[37] And because this interpretation was not foreclosed by the literal language of the statute, the United States Court of Appeals for the District of Columbia Circuit deferred to and upheld the Commission's interpretation.[38]

The Commission relied on this expansive interpretation of the scope of Section 628(b) again in 2010 after it allowed the statutory prohibition on exclusive programming contracts in Section 628(c)(2)(D) to sunset pursuant to Section (c)(5).[39] At that time, the Commission held that, even though it had found that the statutory prohibition was no longer necessary to promote competition, it would continue to entertain complaints against exclusive programming contracts on a case-by-case basis pursuant to Section 628(b).[40] Moreover, it held that it would even consider exclusive programming contract complaints regarding *terrestrially-delivered*

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[35] *See In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Report & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

[36] *See generally id.*

[37] *See id.*

[38] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[39] *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Further Notice of Proposed Rulemaking and Order on Reconsideration, 25 FCC Rcd 746 ¶¶ 3, 11 (2010).

[40] *See id.* ¶ 7.

programming (such as regional sports contracts) because it theorized that such contracts could so impair the competitive viability of an MVPD that they could not successfully compete in the provision of *any* programming – including satellite-delivered programming – to consumers.[41]

By construing Section 628(b) in this manner, the Commission transformed a narrowly circumscribed provision aimed at access to cable-affiliated *satellite-delivered* programming into a mini-antitrust law that broadly prohibits any conduct by a cable operator or a cable-affiliated program network that allegedly hampers the ability of any MVPD to compete. Such an overreach of regulatory authority is not what Congress intended. The Commission should revisit its interpretation of the statute and restore it to its proper scope, meaning, and intent,[42] particularly in light of the substantial amount of competition that has developed in the MVPD marketplace.[43]

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[41] *See id.* ¶ 19, 24. Once again, the D.C. Circuit deferred to and upheld the Commission's arcane and expansive reading of the scope of Section 628(b). *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

[42] Notably, the Commission recently initiated an inquiry regarding broadband access to multiple tenant environments in which it specifically asks whether it should "revisit whether its determination that Section 628(b) extends to matters that do not explicitly involve access to satellite-delivered cable programming is consistent with public policy and the intent of Congress." *In re Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, FCC 17-78, GN Dkt. No. 17-142 ¶ 18 (rel. June 23, 2017). Whether in that proceeding or this one, the Commission should not squander the opportunity to restore the scope of Section 628 to what Congress intended in 1992.

[43] The Commission's annual video competition reports provide ample evidence of this increased competition. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247, DA 17-71, ¶¶ 53-66 (rel. Jan. 17, 2017) ("*Eighteenth Video Competition Report*") (discussing the multiple MVPD business models and competitive strategies that have developed in response to increased competition from OVDs); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, 31 FCC Rcd. 4472 ¶¶ 2, 9-11, 130-209 (2016) ("*Seventeenth Video Competition Report*") (devoting more than eighty paragraphs of discussion to OVDs, and praising the "progress of the online video industry," which "continues to evolve" and "expand[] the amount of video content available to consumers through original programming and new licensing agreements with traditional content creators"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253 ¶ 22 (2015) ("*Sixteenth Video Competition Report*") (noting that "[h]istorically, cable companies rarely competed with one another in the same geographic area," but today, some geographic areas "have as many as five MVPDs . . . directly competing with one another in the delivery of video programming").

III. THE COMMISSION SHOULD CLARIFY CERTAIN PROGRAM CARRIAGE MATTERS.

Section 616 of the 1992 Cable Act is another artifact of the era when cable systems owned a significant percentage of the program networks that they carried and faced little if any competition from other cable systems, phone companies, DBS, or online video distributors. To prevent cable operators from exploiting their lack of competition in the local distribution marketplace to unfairly block competition to their vertically integrated program networks, Congress directed the Commission to establish regulations governing program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors. According to the statute, such regulations shall:

> (1) include provisions designed to prevent a cable operator or other [MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
>
> (2) include provisions designed to prohibit a cable operator or other [MVPD] from coercing a video programming vendor to provide, and from retaliating against such a vendor from failing to provide, exclusive rights against such [MVPD] as a condition of carriage on a system; and
>
> (3) include provisions designed to prevent a [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[44]

In the quarter century since these provisions were enacted, the marketplace characteristics that underlay Congress's concerns have been transformed. First, it's no longer the case that cable operators own any significant number of the hundreds of networks now carried on their systems. Moreover, cable operators now face stiff competition in their local markets and

[44] 47 U.S.C. § 536(a).

nationwide in the distribution of video programming to consumers. As courts have recognized, the prevalence of vibrant competition among video programmers and among distributors of video programming has diminished the ability and incentive of cable operators and other MVPDs to engage in – and networks to demonstrate – the sorts of unfair, anticompetitive conduct at which Section 616 was aimed, even threatening to render restrictions on carriage decisions by MVPDs unconstitutional.[45]

These court decisions, along with Commission rules requiring complainants to set forth a *prima faci*e showing before triggering an administrative proceeding,[46] are useful in limiting the potential continuing burdens and costs imposed by Section 616 while it remains in effect. But there are two aspects of the rules that continue to expand unreasonably the scope and burdens of the rules.

First, as highlighted by the concurring opinion of Judge Edwards in the *Tennis Channel* case, the Commission has misconstrued its own rule setting forth the statute of limitations for program carriage complaints.[47] That rule provides:

> **Time limit on filing of complaints.** Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:
>
> (1) The [MVPD] enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or
>
> (2) The [MVPD] offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the [MVPD]; or

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[45] *See, e.g.*, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 161 (2d Cir. 2013); *Comcast Cable Communs., LLC v. FCC*, 717 F.3d 982, 987-94 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (the "*Tennis Channel*" case).

[46] *See id.*; 47 C.F.R. § 76.1302(d).

[47] *See Tennis Channel*, *supra* note 45, 717 F.3d at 994-1007.

> (3) A party has notified a [MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.[48]

As described in the *Tennis Channel* decision, the Tennis Channel and Comcast entered into a carriage agreement in 2005 under which Comcast had discretion to carry the Tennis Channel on any tier. Comcast chose to carry the network on a sports tier, while carrying two networks in which it had an ownership interest on more widely distributed tiers. Subsequently, but while the carriage agreement was still in effect, the Tennis Channel asked Comcast to move its service to a more widely distributed tier. Comcast declined to renegotiate for such carriage. In 2010, the Tennis Channel filed a complaint alleging that Comcast's refusal to carry its service on a tier with the same distribution as Comcast's own networks violated the program carriage rules.

Although the complaint was filed *five years* after the contract allowing Comcast to carry the Tennis Channel on any tier was entered into and was therefore outside the time limit of subsection (1) of the rule, the Commission determined that it was still timely under subsection (3) because it was filed less than a year after the Tennis Channel notified Comcast of its *intent* to file.[49] As Judge Edwards noted, this was a departure from the Commission's longstanding interpretation of its rule, under which subsection (3) did not apply to refusals of an MVPD to renegotiate an existing contract mid-term but only applied to refusals to negotiate a contract in the first place.[50] Under the Commission's new interpretation, the one-year limitation in subsection (1) would be meaningless, because a party could file a complaint years after entering

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[48] 47 C.F.R. § 76.1302(h).

[49] *See Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC,* Memorandum Opinion & Order, 27 FCC Rcd 8508 8519-22 (2012) ("*Tennis Channel MO&O*").

[50] *See* 717 F.3d at 1002-05.

into a contract simply by asking for renegotiation and notifying the MVPD of an intent to file a complaint after the MVPD declines.

To ensure that a meaningful statute of limitations is in place, the Commission should revisit and reject the interpretation of the rule set forth in the *Tennis Channel* case. It could do so by adopting an interpretive ruling that reaffirms its previous sound interpretation of that prong as limited to unreasonable refusals to deal, *before any contract is formed between the parties.*

Second, the Commission has defined an "attributable interest," for purposes of the program carriage rules – and the program access rules, as well – in a way that captures *nonvoting* and *insulated limited partnership and LLC equity interests* as small as five percent.[51] Such interests (which are *not* attributable under the cable cross-ownership rules) are extremely unlikely to present the sorts of problems addressed by those rules. As discussed above, competition among MVPDs and other sources of video programming have greatly diminished the risk that MVPDs would or could profitably sacrifice the competitive attractiveness of their video service to consumers and seek to promote their own programming networks – even *wholly owned* networks – in a way that unfairly harms competition. Similarly, fierce competition in the programming marketplace reduces the likelihood that a programming network wholly owned by an MVPD would refuse, in an anticompetitive manner, to make its programming available to competitive MVPDs.

In these circumstances, it is particularly unreasonable to continue to provide that if either an MVPD or a program network has as little as a 5 percent *nonvoting or insulated limited partnership or LLC* ownership interest in the other, or if a third party has such an interest in both, the prohibitions of the rules apply. The attribution rules for the program access and program

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[51] *See* 47 C.F.R. §76.1300(b). *See also* 47 C.F.R.76.1000(b).

carriage rules should be harmonized with the cable cross-ownership rules by eliminating that exception.

IV. THE COMMISSION SHOULD REDUCE THE BURDENS IMPOSED ON OPERATORS BY THE LEASED ACCESS RULES.

The requirement for cable operators to lease channels to unaffiliated programmers goes back to the 1984 Cable Act – and applies uniquely to cable operators. The concept of leased access has long outlived its statutory purpose.[52] While the Commission cannot unilaterally remove this obligation, it can and should take measures to ensure that its implementation of the leased access provisions is consistent with its obligation to ensure that the "price, terms, and conditions of such use will not adversely affect the operation, financial condition, or market development of the cable system."[53]

In particular, the Commission should reexamine certain regulatory policies that force operators to incur leased access costs they cannot recover, specifically as it concerns their ability to recoup expenses in responding to leased access inquiries. Operators must devote considerable time gathering the necessary data to respond to even the most casual inquiries from potential lessees who may have little understanding of or appreciation for the nature and costs of leasing.[54] Yet, existing provisions bar most operators from requiring prospective lessees to even fill out a complete application for leased access use.[55] In fact, operators other than small system operators

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[52] *See* 47 U.S.C. § 532(a) ("The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.").

[53] *Id*. § 532(c)(1).

[54] Current rules only provide operators 15 days to respond to requests for leased access. 47 C.F.R. § 76.970(i)(1). The Commission should modify this rule to provide operators additional time (e.g., 45 days) to respond to requests to lease time on multiple systems.

[55] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access,* Order on Reconsideration of the First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933, 16949 (1996); Second Order on Reconsideration, 12 FCC

are prohibited from even requiring a prospective lessee to submit a "bona fide" leased access request. As a result, a prospective lessee might request data for region-wide or state-wide access that requires an operator to engage in complex and time-consuming fact gathering – only to see the potential lessee lose any interest in pursuing leasing once that data is presented to them.

Leased access is required by the Cable Act, and cable operators understand that they have certain obligations to provide accurate and timely information to those who might be interested in leasing time on the system. They also realize that there can be no reasonable expectation that all inquiries will result in actual leasing agreements. At the same time, Congress intended to ensure that operators are made whole when complying with these statutorily-imposed obligations. By failing to protect operators against the need to respond to even frivolous leased access requests, or failing to enable the recovery of the costs of responding to leased access inquiries, current procedural rules exacerbate the unfairness of these cable-specific rules. Accordingly, the Commission should permit operators of all sizes to reply only to *bona fide* leased access requests. It should propose allowing cable operators to require a deposit –even a nominal application fee – to help defray the costs of gathering the information necessary to calculate the leased access rate and to respond to any *bona fide* requests for leased access capacity that never lead to an actual leased access agreement.

Finally, an appeal of the Commission's 2008 leased access decision remains pending.[56] The Sixth Circuit Court of Appeals not only has stayed the Commission's decision for nearly ten years, but it has held the underlying challenge in abeyance pending resolution of a request, filed

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Rcd 5267 ¶ 133 (1997) (barring operators other than small system operators from asking for any information other than the bare information necessary to prepare a response to a leased access request).

[56] *See In re Leased Commercial Access*, Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008), *appeal pending*, *United Church of Christ v. FCC*, No. 08-3245 (6th Cir.).

by United Church of Christ ("UCC"), asking the Commission to override an Office of Management and Budget ("OMB") decision disapproving of the 2008 leased access information collection requirements.[57] For the reasons stated by NCTA nearly a decade ago, the Commission should deny the UCC request.[58]

V. THE COMMISSION SHOULD MODERNIZE ITS CHILDREN'S ADVERTISING LIMITS.

The marketplace for children's programming has undergone significant changes in recent years, including a marked shift to consumption of unregulated children's programming online. As recently reported:

> A half-century ago "streaming video" was an unimagined wonder. But today's TV landscape has been upended by this technology, and by major streaming-video outlets like Hulu, Amazon and Netflix as they aggressively vie for kids' (as well as everybody else's) attention.[59]

At the same time, numerous parental tools and controls have emerged in the marketplace, enabling parents to monitor and set controls for children's television and Internet usage.[60] Given these developments, the Commission should revisit its rules governing children's advertising, and determine whether these rules continue to advance the goals of the Children's Television Act.[61] Such an effort should seek to level the regulatory playing field for traditional

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57 *See* UCC, Request to Override the Action of the Office of Management and Budget and to Modify the Commission's Report & Order, MM Dkt. No. 07-42 (Aug. 26, 2008).

58 *See* NCTA, Opposition to Request to Override the Action of the Office of Management and Budget and to Modify the Commission's Report & Order, MM Dkt. No. 07-42 (Sept. 5, 2008).

59 Frazier Moore, *Kids Prefer the TV for their Viewing, but Love Other Device*, Seattle Times, Apr. 16, 2017, *available at* http://www.seattletimes.com/nation-world/kids-prefer-the-tv-for-their-viewing-but-love-other-devices/.

60 *See, e.g.*, Xfinity, *Parental Controls*, *at* http://parents.xfinity.com/ (last visited July 1, 2017).

61 *See* Children's Television Act of 1990 ("CTA") § 102(c), *codified at* 47 U.S.C. § 303a (providing continuing authority to the Commission to review the children's advertising limits.)

programming providers and to better reflect how children currently consume media.[62] In addition, any such review should include consideration of the important roles with respect to advertising played by the Children's Advertising Review Unit ("CARU")[63] and the Federal Trade Commission.

For instance, the Commission should reassess its restrictions on the mere display of website addresses during children's programming in light of marketplace developments.[64] By regulating the look and feel and commercial activity of programmer websites, the rules put traditional programming providers at an undue competitive disadvantage by restricting their online presence. Specifically, the rules significantly impact the underlying website if an Internet address for the website is displayed on television during children's programming.[65] The Commission adopted these rules based on a concern about future direct connectivity from broadcast television programming to the Internet that might provide marketers direct access to children.[66] Such direct connectivity did not exist then, and remains exceedingly rare – if it exists at all – today.[67] As Congress and the Commission have recognized in the past, advertiser

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[62] *See Frazier Moore, supra, n.60* (pointing to 2013-14 as a "turning point for kids TV . . . with streaming-video-on-demand providers gaining a real foothold and supplemental devices like tablets and mobile taking off").

[63] CARU, founded in 1974 "to promote responsible children's advertising, is an investigative unit of the advertising industry's system of self-regulation." *See* Council of Better Business Bureaus, *About CARU*, *at* http://www.asrcreviews.org/about-caru/ (last visited June 30, 2017). CARU's self-regulatory guidelines "are deliberately subjective, going beyond the issues of truthfulness and accuracy to take into account the uniquely impressionable and vulnerable child audience." *Id.*

[64] 47 C.F.R. § 76.225(b)-(d).

[65] *See id.* Underlying websites must comport with a list of requirements that unduly restrict website design, content, and commercial activity, including a prohibition on "website host-selling."

[66] *See In re Children's Television Obligations of Digital Television Broadcasters*, Notice of Proposed Rulemaking, 15 FCC Rcd 22946 ¶ 29 (2001) ("By converging internet capabilities with broadcasting, digital television permits a new level of interactivity between broadcasters, advertisers, and viewers. . . . The interactive capabilities of DTV also allow for the direct sale of goods and services over the television. This capability present marketers with new opportunities to reach children. . . . ").

[67] *See In re Children's Television Obligations of Digital Television Broadcasters*, Report & Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943 ¶ 53 (2004) (adopting rules restricting the display of Internet address, while at the same time stating "There is little if any use of direct Internet connectivity today in

support is important for production of quality children's television.[68] In light of all these developments, the Commission should look to see whether rules that restrict the online presences of programmers in this manner continue to serve the public interest.

VI. THE COMMISSION SHOULD ELIMINATE OUTDATED CABLE RATE REGULATIONS.

The Commission's cable rate regulations have largely been overtaken by events. Congress in the 1996 Act eliminated the Commission's ability to regulate the "cable programming service" tier.[69] Most recently, in recognition of the tremendous growth in competitive multichannel video alternatives to cable system operations, the Commission shifted its presumption to reflect the reality that cable operators are subject to effective competition essentially nationwide.[70] This effectively eliminated basic service tier rate regulation by local franchising authorities in most jurisdictions. Commission rules may still be necessary to address rate regulation in those handful of communities where the basic service tier is still subject to rate

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television programming of the type that was contemplated when the *Notice* in this proceeding was issued. Accordingly, we find that it would be premature and unduly speculative to attempt to regulate such direct connectivity at this time."). Based on the lack of a problem to be solved, it is time for the Commission to close that proceeding and vacate its tentative conclusion to "prohibit interactivity during children's programming that connects viewers to commercial matter unless parents 'opt in' to such services"). *See id.* ¶ 72. If a need for regulation develops in the future, the Commission should reevaluate the issue at that time.

[68] *See* CTA § 101(3), *codified at* 47 U.S.C. § 303a note ("The Congress finds that . . . the financial support of advertisers assists in the provision for programming to children"); *In re Action for Children's Television (ACT) Petition for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming*, Report & Policy Statement, 50 F.C.C.2d 1 ¶ 35 (1974) ("Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and qualify of such programming. Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area.").

[69] 47 U.S.C. § 543(c)(4).

[70] *See In re Amendment to the Commission's Rules Concerning Effective Competition Implementation of Section 111 of the STELA Reauthorization* Act, Report & Order, 30 FCC Rcd 6574 (2015). A challenge to the Commission's action is pending before the D.C. Circuit Court of Appeals. *See* National Ass'n. of Telecomm. Officers & Advisors *v. FCC*, No. 15-1295 (D.C. Cir., filed Aug. 28, 2015).

regulation.[71] But some existing rate rules address defunct Commission authority over cable programming service tier regulation, and therefore should be eliminated as a matter of regulatory clean-up.[72]

Along these lines, the Commission should seek to address the burdens of another relic of yesterday's cable regulatory regime – the Cable Price Survey requirement.[73] To satisfy the provision, Commission staff annually conduct a survey of a random sample of operators in communities nationwide using FCC Form 333, which seeks information on service and equipment charges, number of subscribers, number of channels offered on each level of service, availability of advanced services, and channel lineups.[74] Cable operators must devote significant resources to completing the survey each year.

In 2013, a GAO report recommended that the Commission evaluate the need for the annual price survey report, noting that less frequent reporting could ease the burden on the Commission and industry participants.[75] The Media Bureau has likewise determined that shifting the reporting requirement to every two years could reduce burdens while fulfilling the intent of the statute.[76] At a minimum, even if the Commission continues to release these reports

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[71] The Commission initiated a review of a number of these rules in 2002. *See In re Revisions to the Cable Television Rate Rules*, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 (2002). That proceeding remains outstanding.

[72] These rules include 47 C.F.R. §§ 76.980 (charges for customer changes in service tiers); 76.984 (requiring geographically uniform rate structure for cable programming service tiers); 76.986 (regulation of "a la carte" offerings): 76.987 (regulation of "new product tiers").

[73] The 1992 Act mandates that the Commission publish annually a statistical report on the average rates that cable operators charge for delivery of basic cable service, other cable programming, and cable equipment. *See* 47 U.S.C. § 543(k).

[74] *See In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Order, 32 FCC Rcd 2984 (Med. Bur. 2017).

[75] *See* U.S. Gov't Accountability Office, *Video Marketplace: Competition Is Evolving, and Government Reporting Should Be Reevaluated* at 33, *available at* http://www.gao.gov/products/GAO-13-576.

[76] *See* FCC, Public Notice, *FCC Seeks Public Comment on Report on Process Reform*, 29 FCC Rcd 1338, 1421-22 (2014).

annually, it should explore whether there are alternative ways to obtaining the underlying data in a manner that would impose fewer burdens on cable operators.

VII. THE COMMISSION SHOULD MODIFY ITS TECHNICAL STANDARDS TESTING REGIME.

Cable operators are subject to extensive Commission oversight of their compliance with government-mandated technical standards. These long-standing requirements go back decades. The 1992 Cable Act required the Commission to "prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality,"[77] standards that should be "update[d] … periodically to reflect improvements in technology."[78] FCC technical standards currently apply to cable's provision of *analog* channels, and related rules require extensive "proof-of-performance" testing twice annually to demonstrate compliance with these analog standards. Thus, those operators that still maintain analog plant are subject to burdensome and costly semi-annual proof-of-performance testing for those analog channels.[79]

This type of intensive regulatory testing regime – adopted when cable operators were the only MVPDs in a community – is no longer justified. Nationwide MVPD competition provides a strong incentive to detect and correct any technical problems as soon as possible – and certainly not to wait until the next proof-of-performance test. Operators, independently of any regulatory requirement, have implemented methods to monitor system performance and conduct routine system maintenance. Even so, operators must devote thousands of additional hours annually to government-mandated testing and documentation. This type of approach can no

[77] 47 U.S.C. § 544(e).

[78] *Id.*

[79] *See* 47 C.F.R.§ 76.601.

longer be justified, and the Commission should look to update its rules to better reflect today's competitive environment.

Even if the Commission were to retain its analog testing regime, there is no reason to create new obligations by superimposing this regulatory construct on *digital* signals. In a pending rulemaking proceeding, NCTA showed that digital technical standards are unnecessary and, at the very least, there is no reason to require digital proof-of-performance testing.[80] The Commission should conclude that rulemaking and find that POP testing of digital signals to demonstrate compliance with the ANSI/SCTE 40 digital technical standards is unnecessary.[81]

Another aspect of the Commission's technical standards testing regime concerns the important issue of signal leakage. Cable operators take seriously their obligation to protect public safety if operating in the aeronautical frequency band, and those rules continue to serve important public purposes. Nonetheless, there may be methods to continue to protect these important safety objectives while easing the annual testing and reporting requirements on operators.[82] For example, Commissioner O'Rielly has suggested that the Commission should consider eliminating or modifying these leakage testing requirements for systems that use extensive amounts of fiber.[83] The Commission should examine whether the objective of protecting aeronautical safety can be achieved while at the same time reducing or eliminating unnecessary testing.

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[80] *See* NCTA Comments filed in MB Dkt. No. 12-217 at 3-7 (Dec. 10, 2012).

[81] *See* NCTA Ex Parte Letter, MB Docket No. 12-217 (May 25, 2017) (detailing costs and burdens of digital proof-of-performance testing); NCTA Ex Parte Letter, MB Docket No. 12-217 (June 30, 2017) (same).

[82] For example, the Commission should provide an easier mechanism for operators to upload their annual signal leakage reports, such as though using an Excel or CSV file.

[83] *See* Remarks of Commissioner Michael O'Rielly, Meeting of the Association of Federal Communications Consulting Engineers (Sept. 16, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-341298A1.pdf.

VIII. THE CABLE PUBLIC FILE RULE IS OVERDUE FOR A SUBSTANTIVE REVIEW.

The rules governing cable public inspection files are long overdue for a fresh look by the Commission.[84] The public file requirement for cable dates to 1974, was modified in 1985 and 1999, but has not been thoroughly reviewed since that time.[85] Although the Commission adopted rules transitioning local cable public files to a Commission-hosted centralized online database in 2016, it generally declined to evaluate the merits of individual public file components.[86] As described below, the Commission should now eliminate or modernize several parts of the public file, which are unnecessary, duplicative, or unduly burdensome. While we do not object to the need to provide certain information to the public, the Commission should take a closer look at whether there is any need to impose these costs on cable operators when much of this public information is already available on company websites.

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[84] Current documentation required to be maintained in the cable online public file includes: political file; EEO file; commercial records on children's programs; list of channels delivered; policy regarding indecent leased access programming (if any); list of must-carry stations carried by the system; operator interests in video programming; sponsorship identification records; and copies of requests for waiver of the prohibition on scrambling or encrypting signals carried on the basic service tier. *See* 47 C.F.R. §§ 76.630, 76.1701 *et seq*. Systems with fewer than 1,000 subscribers are exempt from the public file requirement. *See* § 76.1700(d).

[85] *See In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Obligations of Cable Television Systems to Maintain Public Inspection Files and Permit System Inspections*, Report & Order, 48 F.C.C.2d 72 (1974); *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Obligations of Cable Television Systems to Maintain Public Inspection Files and Permit System Inspections*, Report & Order, 99 F.C.C.2d 959 (1985) (removing several cable public file provisions no longer necessary due to the deregulation of cable television); *In re 1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Report & Order, 14 FCC Rcd 4653 (1999) (broadly reviewing and streamlining cable public file and notice requirements).

[86] *See In re Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report & Order, 31 FCC Rcd 526 ¶ 4 ("With minor exceptions, we do not adopt new or modified public inspection file requirements in this proceeding. Our focus is simply to adapt our existing public file requirements to an online format . . . .") (2016) ("*2016 Online Public File Order*"). Later, the Commission eliminated the requirement that cable systems maintain the designation and location of a system's principal headend in the public file and instead will allow operators to provide such information "upon request" to certain entities. *See In re Revision to Public Inspection File Requirements – Broadcaster Correspondence File and Cable Principal Headend Location,* Report & Order, 32 FCC Rcd 1565 (2017).

Channel line-ups. The Commission should repeal the requirement to include channel lineups (or links thereto) in the public file.[87] This rule does not benefit consumers, who have multiple options for obtaining this information, and does not apply to similarly-situated competitors.[88] Consumers and others looking for current channel lineup information can look to a number of sources, including on-screen electronic programming guides, guide channels, cable operator and third-party websites and apps, and paper lineups provided by cable operators. As NCTA has noted, "[t]here is no indication in the record or elsewhere that consumers find the channel lineups in public inspection files to be useful at all, or that they would look to the Commission's website to locate such information."[89] For the same reasons, the Commission should eliminate the "availability of signals" rule, which requires that cable system public files include a list of must-carry broadcast stations.[90] There is no reason to believe that members of the public would find this information of any utility.

Children's commercial limits. The Commission should eliminate duplicative records regarding compliance with the commercial limits in children's programs. On a quarterly basis, cable operators must upload to each cable system public file "sufficient records to verify compliance with [the commercial limits in children's programming]."[91] In practice, cable operators (and other MVPDs) collect and upload to system public files documents from

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[87] *See* 47 C.F.R. §§ 76.1700(a)(4) & 76.1705.

[88] Moreover, channel line-up information is not required to be included in the public files of DBS providers, who provide similar programming options.

[89] NCTA Comments filed in MB Dkt. No. 14-127 at 8 (Mar. 16, 2015).

[90] *See* 47 C.F.R. §§ 76.1700(a)(7), 76.1709. Although DBS providers have certain broadcast carriage obligations of their own, and also must maintain a public file, no rule requires their public file to include a list of carried broadcast stations.

[91] 47 C.F.R. §§ 76.1700(a)(3), 76.1703; *see also* § 76.225.

programming networks certifying that the network complies with the Commission's rules.[92] Cable operators do not control the programming or commercials on these networks, so they are essentially just collecting and passing along the information. This process is unnecessarily burdensome for both cable operators and programming networks.

Instead of the current requirement, the Commission should permit cable operators to provide relevant documentation from program networks regarding compliance only in the event of a complaint. There is no evidence that cable operators are violating the commercial limits. As is, this rule unnecessarily requires multiple cable operators to collect almost identical information from all of the programming networks carried on their systems -- and to conduct this exercise four times each year. Requiring cable operators on a per-system basis to post virtually identical documentation from dozens – if not hundreds – of programming networks each calendar quarter does not benefit the public; rather, it burdens operators and networks, and unnecessarily occupies capacity on the Commission's online public file database.

EEO records. The Commission requires cable operators to maintain certain equal employment opportunity EEO ("EEO") reports ("EEO public file reports") in cable system public files and on their company websites.[93] Given that system public files are now housed in a Commission-hosted online database, the Commission should eliminate the redundancy in this rule by removing the duplicative company website posting requirement since consumers have

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92 *See In re Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Memorandum Opinion & Order, 6 FCC Rcd 5093 ¶ 22 (1991).

93 *See* 47 C.F.R. § 76.1702(b) (requiring the information to be included "annually in the unit's public file, and on the unit's web site"); *see also* § 76.1700(a)(2). The EEO public file reports contain (1) a list of full-time vacancies filled in the past year, identified by job title; (2) for each vacancy, a list of recruitment source(s) used to fill it, identified by name, address, contact person, and telephone number; (3) the recruitment source that referred the hiree for each full-time vacancy; (4) data reflecting the total number of people interviewed for full-time vacancies, and the total number of interviewees referred by each recruitment source; and (6) a list and description of recruitment initiatives undertaken in the past year. *See* 47 C.F.R. § 1702(b).

equal access to the Commission's database and company websites. In addition, considering the Commission's recent finding that internet recruiting is widespread and can be used as a sole recruitment source, the Commission should analyze the elements of its EEO public file report to determine if there are opportunities to make the recordkeeping and reporting process more efficient.[94]

Small Systems. The Commission should reverse its recent decision to depart from precedent by requiring certain small cable systems to upload documents to online public files that were previously only required to be made available to the public "upon request."[95] In revising its public file rules in 1999 to provide regulatory relief for small systems, the Commission specifically recognized that provision of documents to the public "upon request" would be less burdensome than requiring a comprehensive public inspection file.[96] There is no difference today – a requirement that a slate of documents be preemptively uploaded to the Commission's centralized database is significantly more burdensome than simply providing such documents to the public upon request.

IX. THE COMMISSION SHOULD ELIMINATE ANNUAL CABLE SYSTEM REPORTS.

The cable television system report, Form 325, dates back to 1966, and was adopted as an annual filing requirement in 1971.[97] For several years it was not used, but the Commission

[94] *See In re Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, Declaratory Ruling, 32 FCC Rcd 3685 ¶ 10 (2017) (noting "[e]mployers can automate the process of posting jobs online, and they can automate the process of retaining records").

[95] *See 2016 Online Public File Order* ¶ 49 ("We disagree with NCTA that moving from an 'upon request' regime to an affirmative requirement to upload documents to the online file for these systems represents a burdensome change in regulation."); *see also* 47 C.F.R. § 76.1700(a).

[96] *See 1998 Biennial Review Order* ¶ 25.

[97] *See In re Amendment of Subpart L, Part 91 et al.*, Second Report & Order, 2 F.C.C.2d 725 (1966); *In re Amendment of Part 74*, Third Report & Order, 32 F.C.C.2d 13 (1971).

reinstated it in 1999.[98] Currently, all cable systems with more than 20,000 subscribers must file the form annually, and the Commission may also request completion of the form by a set of smaller operators.[99] Among other things, Form 325 seeks information on channel occupancy (including full channel line-ups), the number of a system's telephone and cable modem subscribers, cable plant miles, and set-top box information.[100] Given that the Form 325 collects competitively sensitive information, many cable operators seek confidential treatment of it. Operators devote many hours to completion of the filing for each PSID every year.

As NCTA has noted in the past,[101] much of the information collected on the Form 325 is available from other sources (not including the sensitive information) and its routine collection from operators by the Commission does not make sense – especially in today's competitive video marketplace. There is no similar requirement applicable to non-cable MVPDs or online video distributors. As explained in dissents to the Commission's 1999 decision to reinstate Form 325, the filing is not statutorily required and does not serve any clear or legitimate purpose.[102] It is time for the Commission to eliminate the Form 325 requirement.

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[98] *See In re 1998 Biennial Regulatory Review – "Annual Report of Cable Television Systems," Form 325, filed pursuant to Section 76.403 of the Commission's Rules*, Report & Order, 14 FCC Rcd 4720 (1999) ("*Form 325 Reinstatement Order*").

[99] *See* 47 C.F.R. § 76.403.

[100] *See Form 325 Reinstatement Order* ¶¶ 19-21. Some of the same information is requested as part of the annual cable price survey questionnaire.

[101] *See* NCTA Comments filed in CS Dkt. No. 98-61 at 6-10 (June 30, 1998).

[102] *Form 325 Reinstatement Order*, Dissent of Commissioner Furchtgott-Roth (explaining that, (1) "the collection of this information is not statutorily required, nor does the item identify any specific, statutorily-based purpose for this information once collected. [T]he fact that we have not collected this information for the last four years undermines the assertion of actual need for it," (2) "any information that we need in order to make regulations governing cable operators can be obtained in the context of specific rulemakings;" and (3) "any rationale for the collection of this information loses force when the filing requirement is not applied evenly to all cable operators"); *id.* Dissent of Commissioner Powell ("[T]here is no statutory requirement that the Commission collect the information required by this form. Indeed . . . the Commission has not collected the information since 1994. . . . There is no reason to assume . . . that general information about cable operators is not available from private sources or industry groups. . . . Nor is there any reason to assume that private parties will lack the information they need to file leased access or program access complaints.").

CONCLUSION

For the foregoing reasons, the Commission should initiate rulemakings as described herein to modernize its cable television rules and to reduce unnecessary regulatory burdens.

Respectfully submitted,

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